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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS, INC., MAY CENTERS OF CAPE, INC., DRURY INDUSTRIES, INC. and CHARLES L. DRURY,

Petitioners,

v.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. May a federal appellate court reverse a jury verdict for a defendant and remand for a new trial on the basis of instructional error without determining whether the plaintiff made a submissible case against that defendant?

2. Where the evidence at trial showed nothing more than the opportunity to conspire and routine, above-board petitioning of an administrative body in support of a rezoning application, should petitioners be forced to undergo a second trial because of perceived instructional error in a separate count relating only to other defendants, without any consideration of whether the evidence against petitioners made a submissible case under *Monsanto Co. v. Spray-Rite* or whether the claim against petitioners fails as a matter of law under the *Noerr-Pennington* doctrine?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The May Department Stores Company, West Park Associates, May Centers, Inc., May Centers of Cape, Inc., Drury Industries, Inc. and Charles L. Drury, defendants in the action below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed on June 17, 1986, as supplemented on denial of rehearing on October 23, 1986.[1]

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[1] In addition to these petitioners, the City of Cape Girardeau, Missouri, was also a defendant below and has filed a separate Petition for Certiorari in this Court (No. 86-1092). Petitioner The May Department Stores Company is the parent of May Centers, Inc. and

OPINIONS BELOW

The October 27, 1981, memorandum and order of the United States District Court for the Eastern District of Missouri granting summary judgment to defendants is reported at 532 F. Supp. 284 and reproduced in Appendix A. The opinion of the United States Court of Appeals for the Eighth Circuit reversing that summary judgment filed November 12, 1982 ("*Westborough I*") is reported at 693 F.2d 733 and reproduced in Appendix B. The opinion of the Court of Appeals filed on June 17, 1986, reversing the jury verdict for defendants ("*Westborough II*") is reported at 794 F.2d 330 and reproduced in Appendix C. The order of the Eighth Circuit filed October 23, 1986, denying rehearing and supplementing the opinion, is reproduced in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1986, and a timely petition for rehearing was denied on October 23, 1986, four judges dissenting (Appendix D). This petition was filed within 90 days of October 23, 1986. Jurisdiction of this Court is founded upon 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

For the second time, the Eighth Circuit has resurrected this baseless lawsuit and remanded it for yet another time-consuming trial, this time because of allegedly defective instructions in the submission of a separate claim against a co-defendant, the City of Cape Girardeau, without even considering the two major threshold issues that warranted affirmance of

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May Centers of Cape, Inc.; otherwise none of the petitioners have any parent or subsidiary corporations (other than wholly-owned subsidiaries) or affiliated corporations which have public shareholders, within the meaning of Rule 28.1 of this Court.

the judgment in favor of petitioners.[2] This Court's intervention is needed to rectify a flagrant failure of the appellate decision-making process and to prevent a colossal waste of judicial time and resources as a result of the further perpetuation of this spurious case.

Background

Respondent Westborough Mall obtained commercial C-4 zoning from the City of Cape Girardeau in 1974 for the purpose of constructing a major shopping center. By 1979 the parcel was still a vacant piece of land and Westborough Mall was broke. The evidence showed that it was unable to attract the large major tenants needed to anchor a development of this kind and that it had more than $300,000 in debts.

The ordinances of the City of Cape Girardeau provide that if a C-4 tract is not developed within three years of zoning, it loses its C-4 status and reverts to the previous zoning classification. Westborough Mall's zoning ordinance contained a specific exemption from this provision. In April 1979 the City Manager (Lawley) received an inquiry from the City Engineer concerning the zoning status of Westborough Mall. The City Manager, without looking at the Westborough Mall ordinance and having forgotten about the exemption, assumed the three-year rule applied, told the City Engineer to change the zoning map back to the previous classification, and announced to the press that Westborough Mall had lost its C-4 zoning.

It is clear — though perhaps irrelevant for present purposes — that the reverter had no effect on Westborough Mall, which in the words of its president had been "blowed out of the water" by numerous debts and a lawsuit that had been filed against it by its grading contractor seeking payment of more than $300,000 in delinquent bills. Westborough Mall's presi-

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[2] A discussion of the Court of Appeals' opinion as it relates to the defendant City of Cape Girardeau is contained in the companion Petition for Certiorari filed by the City in No. 86-1092.

dent, respondent George Staples, wrote to his partners that he was confident that the C-4 zoning was intact and intended to proceed as if the matter had not come up. Instead of pointing out the City Manager's oversight, respondents sought to capitalize on it in an attempt to bolster a lawsuit previously filed in which they challenged petitioners' zoning. They contended that the "reverter" constituted a deprivation of their property without due process and that petitioners had conspired with the City to effectuate that deprivation.

In 1979 petitioners applied for and were granted C-4 zoning for the construction of an enclosed regional shopping center known as West Park Mall, which has since been completed approximately one mile west of respondents' site.

There was not even a scintilla of evidence that any representative of petitioners conspired with any City official with regard to the "reverter" or that petitioners' contacts with the City were anything other than routine, legitimate actions in support of their rezoning application.

The First Appeal

This eight-year-old lawsuit began in state court as an action by respondents against the City challenging petitioners' zoning for West Park Mall. After changing lawyers several times, respondents added civil rights claims and joined petitioners as defendants, alleging a conspiracy with the City to violate respondents' civil rights. Following removal to federal court, the addition of several antitrust claims and months of intense discovery, petitioners filed a motion for summary judgment, which was granted by the district court in 1981 (Appendix A). Summary judgment was entered because, *inter alia,* there was "no evidence . . . which would indicate that any of the moving defendants knew anything of Lawley's opinion or his acts prior to the time they were reported in the newspaper, or in any way prompted him to act as he did." The court also ruled that contacts between the City and petitioners were protected by the first amendment, as applied by this Court in *Eastern Railroad*

Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 367 (1965).

Respondents appealed to the Eighth Circuit. In a 1982 opinion authored by Judge Heaney (Appendix B), the Court of Appeals reversed the summary judgment, based solely on speculation about what respondents "might" be able to prove. There was no evidence of concerted action, but the court construed and relied on certain documents which had not been identified by any witness and which were not properly in the record in determining that respondents' claims should go to the jury.

On the *Noerr-Pennington* point, the Court of Appeals said that "we find that the defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions." Petitioners filed a Petimion for Certiorari in this Court from that opinion, but it was denied. 461 U.S. 945 (1983).

The Trial and the Second Appeal

The jury trial sought by respondents consumed ten trial days. There was no evidence whatsoever that petitioners were involved in any way in the "reverter," which is now the entire focus of respondents' case. All of the witnesses on behalf of petitioners testified that they first learned of the City Manager's actions when they read about them in the newspaper. There was no showing that petitioners did anything other than lobby public officials to grant their rezoning requests so that they might proceed with the development of West Park Mall.

Petitioners moved for a directed verdict, but the trial court felt compelled by the earlier Court of Appeals' opinion to submit the case to the jury. Count I was submitted against the City only, claiming a §1983 violation by reason of the "reverter." Count II was submitted against petitioners on a theory of a conspiracy to violate respondents' civil rights under §1983. The jury returned a verdict for all defendants in less than two hours.

Once again, respondents appealed. Their primary attack was against the instructions on Count I, and nowhere in their brief did they assert any error *vis-a-vis* petitioners or even mention them by name. For their part, petitioners not only sought to sustain the jury's verdict but also argued that they were entitled to judgment as a matter of law because (a) there was no evidence of conspiracy and (b) the *Noerr-Pennington* doctrine protected their legitimate dealings with the City. The Eighth Circuit (through McMillian, J.) ruled that the instructions on Count I against the City were defective and remanded the case for another trial against *all* defendants without any discussion of whether a submissible case had been made against petitioners.

Petitioners filed a petition for rehearing en banc, pointing out that the panel had ignored the issues presented and that the instructional error in Count I did not affect the validity of the verdict in their favor on Count II. Rehearing en banc was denied by a 5-4 vote. The panel supplemented its opinion by saying that "misdirection by the district court on the due process claim prevented the jury from properly deciding the conspiracy claim." Once again, however, the court refused to discuss whether a submissible case had been made against petitioners.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court of Appeals Abdicated Its Judicial Responsibility by Remanding This Case for Another Needless Trial Without Deciding Whether a Claim Exists Against Petitioners as a Matter of Law.

First the judge then the jury decided that petitioners should prevail in this case. Yet petitioners now face the prospect of another costly trial and cannot be blamed for wondering whether our legal system works.

In two appeals the Eighth Circuit first rejected and then ignored petitioners' well-supported legal arguments. The first *Westborough Mall* opinion was apparently induced by the appellate court's suspicion that something might be amiss, even though nothing in the record supported that suspicion. The court pointed to unidentified, unauthenticated hearsay documents as evidence of what "might be proven." Despite the fact that nothing had been established other than the opportunity to conspire, the Court of Appeals unraveled the district court's summary judgment and sent the case to trial. Its ruling was patently at odds with *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), where this Court held that a plaintiff must adduce conspiracy evidence that tends to exclude the possibility that the putative co-conspirators were acting independently. The Eighth Circuit's application of summary judgment principles was also incompatible with this Court's reasoning in *Celotex Corporation v. Catrett*, 54 U.S.L.W. 4775, ___ U.S. ___ (1986); and *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, ___ U.S. ___ (1986). Moreover, its interpretation of the *Noerr-Pennington* doctrine in a civil rights context was 180° from its earlier opinion in *Gorman Towers, Inc. v. Bogaslovsky*, 626 F.2d 607 (8th Cir. 1980).

This Court refused to intervene at that stage, perhaps in the hope that a jury verdict for defendants would moot an obviously flawed appellate opinion. Unfortunately, the denial of cer-

tiorari served only to reinforce the Court of Appeals' conviction that its work is largely unreviewable. As petitioners have painfully learned, such convictions can often lead to untenable results and interminable litigation.

At trial, respondents did not make any genuine effort to establish that petitioners had conspired with the City to violate their civil rights. They adduced no evidence of any such conspiracy because there was none. In fact, the key document that had been relied on by the Eighth Circuit in reversing summary judgment in *Westborough I* turned out to mean exactly *the opposite* of what the Court of Appeals had construed it to mean.

The jury, faced with a convincing record showing (a) that there was no actual reverter of respondents' zoning, (b) that there was no damage in any event because Westborough Mall was already bankrupt, and (c) that at any rate petitioners were not involved in the reverter, quickly returned a verdict for all defendants.

The Court of Appeals' reversal of the jury verdict as to the City betrays a tortured construction of Section 1983, as demonstrated in the City's separate Petition for Certiorari. But the reversal as to these private petitioners, without even a mention of their directed verdict arguments, is too much and casts a pall over the justice system in the eyes of the bewildered parties involved.

Westborough I had specifically held that a conspiracy *might* be proven and that *Noerr-Pennington might* be inapplicable. The court at that time obviously recognized that if petitioners prevailed on either of those points, they were entitled to judgment. Nevertheless, its opinion in *Westborough II* adamantly and inexcusably refused to discuss the submissibility of the case against petitioners. Putting the horse behind the cart, the court simply said that instructional error on Count I required petitioners to undergo yet another trial on the Count II conspiracy claim, without regard to whether that claim should have gone to the jury at all.

If the original opinion in *Westborough II* was an oversight, the panel's persistence in refusing to address the issues in response to the petition for rehearing can scarcely be called inadvertent. The Eighth Circuit's security in its perceived role as a court of last resort has precipitated a *second* unnecessary, wasteful, expensive trial and probably yet another appeal. Fairness and precedent have consistently taken a beating in this case, but *Westborough II* represents such a pronounced departure from well-accepted principles of decision-making that it requires this Court's attention and correction.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted; alternatively, certiorari should be granted, the judgment below summarily vacated, and the case remanded to the Court of Appeals with instructions to decide the submissibility of the case against petitioners and the *Noerr-Pennington* issues.

Respectfully submitted,

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January 1987

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 80-105 C

Westborough Mall, Inc., a Corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Plaintiffs,

vs.

City of Cape Girardeau, Missouri, a Municipal Corporation, Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,
Defendants.

MEMORANDUM AND ORDER

(Filed October 27, 1981)

This matter is before the Court upon the motions of Charles L. Drury, Drury Industries, Inc. (Drury defendants), the May Department Stores Company, the May Centers, Inc., the May Centers of Cape, Inc. (May defendants), Paul W. Stehr, Robert Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, the City of Cape Girardeau, Missouri, and West Park Associates, for summary judgment on each count of plaintiffs' seven count complaint which includes alleged violations of 42 U.S.C. § 1983 (Count 1), a conspiracy to violate plaintiffs'

constitutional rights as made actionable under the same statute (Count 2), a violation of the Sherman Act, 15 U.S.C. § 1 (Count 3), a violation of 15 U.S.C. § 2 for a conspiracy to monopolize (Count 4), an alleged conspiracy to interfere with plaintiffs' valid business relationships (Count 5), a Sherman Act count against five members of the Cape Girardeau City Council (Count 6) and the prayer for declaratory judgment and injunctive relief, to-wit: the striking down of two ordinances of the Cape Girardeau City Council (Count 7) pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The cause of events which gave rise to this suit surrounded the failure of one group of developers and the success of another group in their efforts to build a regional shopping center in Cape Girardeau, Missouri. Plaintiff, Westborough Mall, Inc., is a Missouri corporation which in 1973 leased approximately sixty seven (67) acres of land in Cape Girardeau, Missouri, at Bloomfield Road and Missouri Highway 61 (Kingshighway). George Staples, Jr., a principal of Westborough Mall Associates, a Missouri limited partnership, was the prime mover and organizer of the Westborough Mall project which involved the building and managing of a major retail shopping center on the above mentioned site. Staples made several attempts to secure "anchor" tenants for the Mall project—major department stores which would enhance the attractiveness of the project to other tenants and retail customers. In June of 1974, Westborough Mall, Inc. was granted C-4 zoning by the City of Cape Girardeau which provided for the construction of an enclosed integrated shopping mall containing three major department store tenants, as well as other small specialty shop tenants. Staples continued to solicit a supporting commitment from major department stores but was unsuccessful and shelved his development plans for approximately two years. In 1976, Staples formed a limited partnership which raised $800,000 contributed by various local limited partners in a further effort to salvage the project.

By mid-1977 Staples arranged for site preparation including grading work to be done by the Penzel Construction Company of Jackson, Missouri. Due to unforeseen and substantial rock formations on the property, the grading project proved to be considerably more difficult and expensive than had been originally contemplated. By late 1978 the Penzel Construction Company was claiming approximately $300,000 owed by Staples which had not been paid. Soon after the receipt of the first unpaid bills Staples removed his wife, son and daughter as general partners of the limited partnership. Penzel asserted mechanic's liens against the Westborough Mall Associates in May, 1979 seeking to collect more than $312,000. This group also was indebted to the Bank of New Madrid, Missouri in the sum of Two Hundred Eighty Six Thousand Dollars ($286,000). At this time the partnership had no liquid assets and no letters of commitment from any major tenants.

In June, 1978, Staples had agreed with Penzel Construction Company that the Company was to construct a shell building on the site. This contract contained a forfeiture clause which provided that if financing for the mall had not been arranged by May 1, 1979 Westborough Mall Associates was to forfeit $5,000 to Penzel. As of that date no commitment had been obtained for financing and the grading bill had not been paid. Penzel, a limited partner in Staples' Westborough Mall Associates, had to institute a suit against the partnership and Staples in state court in an attempt to collect the $5,000 penalty and the unpaid grading bill. Such bill has not been paid to date. In fact, no substantial, successful preparations had been made at that time, and no building plans have ever been prepared for any structure at the Westborough Mall site. In sum, by mid-1979, Westborough Mall had no liquid assets, no major department store tenants, no building plans, no commitments for financing, and had past numerous projected target dates promised by Staples throughout the years. In 1979, Westborough Mall was no closer to viability than it was in 1973.

The City Manager of Cape Girardeau, Missouri, defendant W. G. Lawley, was referred to in an article in the April 18, 1979 issue of the Southeast Missourian—a local daily newspaper—as questioning the validity of Westborough's C-4 zoning due to a requirement in the Cape Girardeau zoning code which provided that construction had to commence within three years of the grant of C-4 zoning or the zoning would lapse. Lawley later ordered the zoning maps of the City changed so as to reflect that C-4 zoning for Westborough Mall had lapsed and instructed the City Engineer of Cape Girardeau not to issue building permits for the Westborough site. There exists no evidence at this time before this Court which would indicate that any of the moving defendants knew anything of Lawley's opinion or his acts prior to the time they were reported in the newspaper, or in any way prompted him to act as he did. In fact, Lawley was unaware that the C-4 zoning given to the Westborough Mall site contained an exemption to this three year requirement, and consequently the Westborough group actually enjoyed C-4 zoning throughout this time frame.

Staples argues that this action by Lawley had a substantial chilling effect on the prospect of the Westborough Mall project attaining major tenants and financing. Nevertheless, Staples continued to reassure his partners and armed with his own belief that Westborough Mall's C-4 zoning remained in effect and his attorney's opinion to that effect, he professed an intention to proceed with the project as if Lawley had never made his statements. Staples never petitioned or in any way approached the City for a clarification or reaffirmation of his C-4 zoning. On May 14, 1979 Westborough Mall, Inc. agreed to sell the leasehold interest it held in the site, yet no sale has ever been effected.

The Mall eventually built in the City of Cape Girardeau, the West Park Mall, is located at Route K and Mount Auburn Road. The site was owned by Drury Industries which in late 1978 entered into a partnership agreement with the May Centers

of Cape, Inc. At the time of the execution of this agreement there existed no arrangement whereby May Department Store or Famous Barr, major retail department stores, would be located in the shopping center. Famous Barr although had expressed some interest in entering the Cape Girardeau market but as early as 1976 had decided not to open a store there.

The City Attorney of Cape Girardeau had assured Drury that a shopping center could actually be constructed on C-2 zoning and Drury requested the City to rezone to C-2 those portions of the site which were not already so zoned. When the application for C-2 zoning was submitted, the finalized layout of the shopping center had not been sufficiently completed in order to file an application for C-4 zoning. The developers told the City that C-4 zoning would be requested as soon as the plans had become sufficiently finalized.

Pursuant to governing ordinances, a public hearing was held before the Planning and Zoning Commission of Cape Girardeau concerning this C-2 application. This request was vehemently opposed by Staples and his business associates, but the Planning and Zoning Commission recommended the approval of the application. Further, public hearings were held before the City Council in accordance with the applicable regulations, and the Council on April 4, 1979 approved the C-2 zoning. A few months later the developers prepared and filed an application for C-4 zoning, and again after extensive public hearings before both the Planning and Zoning Commission and the City Council, the Council voted to grant C-4 zoning to the West Park Mall site. The West Park Mall is now largely a reality with two major anchor tenants and the vast majority of its rentable space being occupied.

Counts 1 and 2 of the amended complaint state a claim for damages and attorney's fees under 42 U.S.C. § 1983. Count 1 refers only to the City officials and Count 2 to all of the defendants. Count 2 is an allegation that all of the defendants acted

pursuant to an agreement and conspiracy under "color of state law to deprive plaintiffs of their rights...secured to them by the Fourteenth Amendment of the United States Constitution." The deprivation of plaintiffs' rights secured by the due process and equal protection clauses in the Constitution resulted from the active subversion of the development of Westborough Mall while developing the West Park Mall. The acts which constituted this deprivation where the statements of Lawley concerning the lapse of the C-4 zoning of Westborough Mall and the securing of the City Council's ordinances 1437(C-2) and 1469(C-4) permitting the development of West Park Mall.

The City Manager's statement of his own opinion concerning the lapse of Westborough Mall zoning, in this Court's view, had no detrimental effect on Westborough Mall's development in light of the Mall's prior history and potential by April, 1979. The City had taken no official action with regard to Westborough Mall zoning. Staples assured all his business associates that this was merely an individual's opinion and that no City Council member had unequivocably stated that Westborough Mall zoning had in fact lapsed. Furthermore, upon reviewing all the evidence submitted to this Court upon this motion, it is clear that there is no indication that any of the private defendants knew of or in any way solicited Lawley's opinion concerning the lapse of Westborough Mall's zoning. Plaintiffs' inability to execute the development of Westborough Mall can most certainly be traced to their inability to attract major financial backing or raise the interest of even one major anchor tenant. Westborough Mall's own financial agent, Charles Green, testified that more than Sixteen Million Dollars ($16,000,000) would be necessary to build the Mall, and that the group had never so much as filed a loan application due to its inability to attract major tenants. By April, 1979 Westborough Mall owed Penzel Construction Company over $300,000. Carl Penzel testified that his company refused to build any structures until the grading bill was paid. Also Westborough Mall had no construction contracts let by April, 1979, nor had building plans

been drawn up, and no evidence indicates that Staples and his group had in its employ anyone capable of doing so. It is therefore clear to this Court that the Westborough Mall was in the severe administrative and financial difficulty which assured its demise long before the difficulties arose which allegedly were experienced due to the acts of the defendants.

After extensive discovery in this cause including the depositions of Lawley, the City Engineer, and all the Councilmen defendants, plaintiffs have been unable to unearth a shred of evidence linking an improper act of the City defendants to the private developers' efforts to build West Park Mall. Also no evidence of a link between the acts of either group to damages suffered by plaintiffs has been established.

The allegation that the May and Drury defendants deprived plaintiffs of due process and equal protection rights by obtaining C-4 commercial zoning for West Park Mall meets its demise when viewed in light of the decision of the Eighth Circuit Court of Appeals in *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980). *Gorman Towers* dealt with a suit against various public officials, landowners and a landowner's attorney all of whom allegedly conspired to rezone a portion of real estate from multiple to single family dwellings thereby depriving the developers of equal protection under the Fourteenth Amendment. The Eighth Circuit held in part that the private citizens and their attorney who sought the change in zoning were absolutely privileged by the First Amendment in their successful attempts to persuade the city officials of Fort Smith, Arkansas to downzone the property involved and thereby effectively kill a proposed apartment complex. The active opponents of the housing project pressed upon the Eighth Circuit a theory of derivative immunity protecting the individual defendants—that immunity derived from the absolute immunity enjoyed by the city officials, *see Harley v. Oliver,* 404 F.Supp. 450, 454 (W.D. Ark. 1975), *aff'd* on other grounds, 539 F.2d 1143, 1145-46 (8th Cir. 1976), and also on a general grounds of

insufficiency of the pleadings, but the Court failed to reach these issues "...for we adopt the district court's holding that the private citizens and their lawyer were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiff's damages." *Gorman Towers* at 614. The City and the Councilmen defendants enjoy an absolute federal common law immunity from suit under 28 U.S.C. § 1983 for the Eighth Circuit in *Gorman Towers* held the absolute immunity enjoyed by state and regional legislators under *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) extended to local legislators. *Gorman Towers* at 612, 613.

Plaintiffs' claim of deprivation of equal protection flies in the face of the facts surrounding the consideration by the Cape Girardeau City Council and the Cape Girardeau Planning and Zoning Commission of Ordinances 1437 and 1469 (C-2 and C-4 zoning for West Park Mall) in that the Westborough Mall developers had every opportunity to oppose West Park Mall's petitions for rezoning and indeed exercised every such opportunity with vigor. After the Westborough group exhausted the legitimate political means by which they could contest the rezoning, and all concerned parties were heard, the City Council voted to grant West Park Mall the same competitive opportunity which Westborough had enjoyed for many years, that is C-4 zoning. Any causal link between the failure of the Westborough Mall project and the West Park Mall rezoning is simply nonexistent. The Westborough group had better than six years to secure financing, attract major tenants and provide for the construction of their project prior to the West Park rezoning, but none of these essential elements of the success of a modern shopping mall had been secured. It is therefore proper that summary judgment be granted on Count 2 of plaintiffs' complaint.

Plaintiffs have further alleged that these private defendants have conspired to restrain trade in violation of § 1 of the Sher-

man Act, 15 U.S.C. § 1 in Count 3; conspiracy to monopolize the regional shopping center marketing in the Cape Girardeau, Missouri metropolitan area in contravention of § 2 of the Sherman Act, 15 U.S.C. § 2 in Count 4; and further in Count 6 a violation of the aforementioned statute in a creation of a monopoly in the operation of a regional shopping center in Cape Girardeau.

Having recognized above that there exists a total lack of evidence linking any acts committed by defendants to any of the statements by Lawley concerning the downzoning of the Westborough Mall tract, and Staples' total lack of concern about such statements as well as the questionable effect or validity of such statements, plaintiffs' claim boils down to its illegal monopoly creation. This Court further reasons that this claim must fail since imposing liability on private parties in this instance would undermine their right to petition their legislature for favorable legislation. This right has been refined and secured by the Supreme Court in their adoption of Noerr-Pennington doctrine in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mineworkers of America v. Pennington*, 381 U.S. 657 (1965). This immunity protects even persons having anti-competitive intent in seeking to effectuate legislation favoring their own economic interests. Further, although the plaintiffs claim to have been subjected to prejudicial or unreasonable legislative acts, the facts indicate that the Board of Zoning Commisioners and the City Council merely voted to extend the same zoning opportunities to West Park Mall previously enjoyed by the Westborough Mall project. The decisions were based upon the substantiated view that the West Park group was simply better organized, financed, and could more readily deliver on its promise to build a regional shopping mall in Cape Girardeau if given an opportunity. Therefore, the acts of these defendants in seeking to obtain through the legislative process an equal opportunity to that which the Westborough developers had long enjoyed are not within the scope of the antitrust laws. Finally, in

Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not bind the states and in no way restrains state acts such as the passage of the ordinances challenged herein. Even a pure monopoly—if a competition between one firm and another for the placement of a regional shopping mall in a specific area can be labeled the establishment of the monopoly—is immunized if the monopoly is established under state law. *Ladue Local Lines, Inc. v. Bi-State Development Agency,* 433 F.2d 131 (8th Cir. 1970). *See also California Retail Liquor Dealers Association v. MidCal Aluminum, Inc.,* 445 U.S. 97 (1980).

Pursuant to the guidelines established in the *California Retail* case, the state action immunity clearly extends to the zoning or rezoning powers of the municipalities in Missouri, *See State of Missouri ex rel Ellis v. Liddle,* 520 S.W.2d 644 (Mo. App. 1975), § 89.020 et seq. RSMo 1978. This Court would question the validity of plaintiffs' argument that this case even concerns a "monopoly" under the antitrust laws. When it is axiomatic to all parties involved that only one enterprise can succeed in a certain area due to natural market conditions, costs of production, and total dollar demand, it can hardly be said that the success of one enterprise bestows upon the other a cause of action in antitrust. This limitation is brought to bear even more heavily in this case where the private defendatns sought only the same competitive environment—that is the same zoning—as the plaintiffs had enjoyed for some five years.

The competition which took place between the plaintiffs and defendants occurred before an open legislative body which afforded both parties full rights to express themselves in public hearings and legitimately determined to give both parties equal access to the relevant shopping center market. *See Hecht v. Pro-Football, Inc.,* 570 F.2d 982 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978). In sum, there exists no evidence of anti-competitive conduct by the defendants and therefore as a matter of law plaintiffs' monopoly claims must fail.

Plaintiffs Count 5 alleges a conspiracy to interfere with plaintiffs' valid business relationships and expectancies. Plaintiffs set out the persons with whom these relationships were enjoyed as only the (potential) tenants of Westborough Mall and "others". In outlining the elements of the tort of intentional interference in business relationships in *Salomon v. Crown Life Ins. Co.*, 536 F.2d 1233 (8th Cir. 1976), the Eighth Circuit held that the defendants' behavior in the potential interference must be without justification. Cases interpreting this requirement including *Salomon* specify that actions taken in defendants' own economic interest—absent some wrongdoing—cannot constitute a tortious interference. This requirement clearly provides for the inevitable conflicts inherent in the free enterprise system. *See Francis Chevrolet Co. v. General Motors Corp.*, 602 F.2d 227 (8th Cir. 1979). The efforts of the West Park group to build a shopping mall were justifiable as being legitimate business activity and not predatory or directly destructive of the Westborough plan. This Court further notes that its finding that the Westborough Mall project failed not due to the acts of defendants but rather due to the legitimate competitive successes of the West Park group and the inability of plaintiffs to execute its own business undertaking, Count 5 must also fail as a matter of law.

Plaintiffs' amended complaint Count 7 alleges that ordinances 1437 and 1469 are void for various reasons. The Missouri Court of Appeals in *Schmitt v. City of Hazelwood,* 487 S.W.2d 882 (Mo. App. 1972) faced a similar question to the issue herein when it decided whether the operator of a car wash had standing to challenge a special use permit granted by the city to allow a competitor to also operate a car wash. The court reasoned that "they (zoning ordinances) promulgate a scheme of development and the municipality and preserve the character of the neighborhoods and the interest of the public in general," *Schmitt* at 888, and upheld the dismissal of the plaintiff's complaint. The Cape Girardeau Zoning Commission determined

that the effect of the zoning of West Park would not be detrimental to the public health, safety and morals or general welfare of the community, the scheme of development of the community, or threaten the preservation of the character of the surrounding neighborhood contrary to the public interest. As the Court noted in *Schmitt* at 888 "comprehensive zoning ordinances are not intended to confer business monopolies on individuals". This is precisely what Westborough Mall seeks to effectuate by attack on ordinances 1437 and 1469, and since competitive disadvantage flowing from a zoning ordinance is not the particular interest which gives rise to standing on behalf of the disadvantaged firm to challenge that zoning, Count 7 must fail as a matter of law. *See also Palmer v. St. Louis County,* 591 S.W.2d 39 (Mo. App. 1979).

A review of the exhibits and documents defendants put forth which were reviewed by the City Planning and Zoning Commission when considering these two requests, fully indicates that in the course of the hearings held and the presentations made by all concerned parties, the zoning requests were reviewed in detail and thoroughly scrutinized. There exists no evidence that any city official acted with a disregard for the public welfare, in an arbitrary or capricious manner, or in any way advancing their own personal interests. It cannot be said that these legislative acts clearly were not even fairly debatable or that an abuse of discretion occurred beyond a reasonable doubt. *See Tealin Company v. City of Ladue,* 541 S.W.2d 544 (Mo. banc 1976) and *Kellogg v. Joint Counsel of Women's Auxiliaries Welfare Assn.,* 265 S.W.2d 374 (Mo. 1954).

Plaintiffs object to the West Park zoning in that it contradicts a 1977 'comprehensive plan' for zoning for the City of Cape Girardeau, that there would exist an adverse impact on traffic and drainage in the surrounding area, that the passage of the ordinance would affect the value of certain property in the City, that the ordinance would constitute spot zoning, and that defendants were part of a larger illegal scheme or conspiracy. This

Court notes that based upon the deposition testimony submitted to this Court it is certain that the 'comprehensive plan' has never been adopted by the City and therefore is not binding upon it. Further, the plan is expressed in terms of goals and options for future development and is not in itself a zoning code which would bind the Council when faced with the West Park Mall zoning applications. There is no evidence that the traffic and drainage problems which would allegedly arise from the rezoning would have actually taken place. The decrease in the value of other land is not a proper or sufficient grounds with which to overturn a rezoning decision of a city. *Treme v. St. Louis County,* 609 S.W.2d 706, 714 (Mo. App. 1980).

Equally frail is plaintiff's argument that these ordinances constitute spot zoning. The application of West Park Mall and the zoning of the surrounding areas indicate that the C-2 and C-4 zoning for the tract did not constitute "unique treatment contrary to like property in the same general location", *Wheeler v. City of Berkeley,* 485 S.W.2d 707, 711 (Mo. App. 1972). By its very nature, all zoning will render a particular parcel distinctive from surrounding land in terms of its permissible use. But it can in no way be said that the C-2 and C-4 zoning for the West Park Mall project was out of line with surrounding lands. In fact, plaintiff's argument that this particular tract zoning constituted spot zoning would be equally applicable to its own site which enjoyed C-4 zoning since 1974 and was less than a mile away.

With regards to plaintiffs' allegation that the rezoning ordinances were part of a larger illegal scheme as alleged in previous counts is fatally defective in that after voluminous discovery being had, there exists no evidence of any such illegal scheme.

Lastly, plaintiffs' claims of a denial of due process or a deprivation of equal protection of the law are not valid grounds for enjoining the zoning ordinances since these claims

legitimately arise only if these zoning ordinances do not bear a "substantial relation to the public help, safety, morals, or general welfare". *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Since zoning is rationally related to a legitimate state interest and the two contested ordinances are not irrational either in their distinction between the West Park site and other sites nor in its application to the Westborough Mall and West Park Mall projects, plaintiffs' equal protection and substantive due process claims must also fail as a matter of law. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

For the above stated reasons, it is proper that summary judgment be entered on plaintiffs' seven count complaint.

Dated this 27th day of October, 1981.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2314

Westborough Mall, Inc., a Corporation; George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its Sole General Partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a Municipal Corporation; Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 19, 1982
Filed: November 12, 1982

Before HEANEY, Circuit Judge, HENLEY,* Senior Circuit Judge, and BECKER,** Senior District Judge.

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* Judge Henley assumed senior status June 1, 1982.

** The Honorable WILLIAM H. BECKER, United States Senior District Judge, Western District of Missouri, sitting by designation.

HEANEY, Circuit Judge

This action was brought by Westborough Mall, Inc., and others to challenge actions taken by the City of Cape Girardeau, city officials and various private individuals and business concerns involved with the development of the West Park Mall, a shopping center located in the City of Cape Girardeau. The Westborough Mall developers claimed that the city illegally acted to deprive them of their zoning rights without due process of law. They also alleged that city officials and the West Park Mall developers illegally conspired to preclude competition by improperly reverting the C-4 zoning the Westborough developers had obtained to construct the Westborough Mall and then granting development rights to the West Park group. Finally, they asserted that two ordinances rezoning the West Park Mall property were illegal.

On October 27, 1981, the district court entered summary judgment in favor of the city and the West Park Mall developers. Although we agree with the district court that the Westborough developers lack standing to challenge the zoning changes granted to the West Park group, we find there is sufficient evidence that the city deprived the Westborough developers of their zoning rights without notice or a hearing to preclude a judgment as a matter of law. We also believe there are genuine issues of material fact regarding the existence of an illegal agreement between city officials and the West Park Mall developers to intentionally interfere with the progress of the Westborough Mall. We therefore reverse the district court in part and remand for a trial on the merits of these claims.

Our holding is based upon the established rule that summary judgment is justified only when, viewing the facts and inferences that may be deprived therefrom in a light most favorable to the nonmoving party, the court is convinced there is no evidence to sustain a recovery under any discernible cir-

cumstances. *Ralph's Distributing Co. v. AMF, Inc.*, 667 F.2d 670, 672 (8th Cir. 1981); *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The burden is thus on the defendants to establish their right to judgment as a matter of law; there must be no genuine issue of material fact and no room for doubt or controversy. *See id.; St. Louis County Bank v. United States,* 674 F.2d 1207, 1209 (8th Cir. 1982). A review of the facts in this case demonstrates why, in view of these standards, the district court erred in granting summary judgment.

Both plaintiff George Staples, Jr., and defendant Charles Drury, President of Drury Industries, Inc., had expressed interest in developing a shopping mall in the City of Cape Girardeau in the early 1970's. In 1973, Staples entered into a long-term lease on approximately sixty-seven acres of land for the purpose of constructing a regional shopping facility, referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted ordinance 904, which rezoned the Westborough Mall property to C-4, a zoning change that the owners of the property had applied for upon the mayor's suggestion to Staples that C-4 zoning was required for the development of a regional facility. This ordinance exempted the property from another local ordinance, Chapter 30, § 31, subsection (e) of the Code of Ordinances, which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in force prior to the establishement of the C-4 district.

It was not until several years after the plaintiffs obtained C-4 zoning that Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop a competing center, the West Park Mall. The West Park Mall was to be located on land owned by Drury that was less than one mile from the Westborough site.[1] The gravamen of plaintiffs' complaint is

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[1] The defendants concede that the two sites are equal in terms of development potential. The district court apparently assumed for

that the city and the West Park Mall developers conspired to preclude competition by the plaintiffs by illegally reverting their C-4 zoning. The plaintiffs claim that this action was taken to allow the May-Drury defendants the opportunity to secure tenants and begin operation of the West Park Mall.

The district court held that there was no evidence of a conspiracy and, further, that any action taken by the city or the private defendants regarding the status of plaintiffs' zoning had no effect on the viability of plaintiffs' project, since plans for the development of Westborough Mall had not materialized and the project was in essence a failure. The plaintiffs argue that the existence of an illegal conspiracy may be inferred from the nature of the relationship between city officials and defendant Charles Drury and from the improper actions taken by the city to revert plaintiffs' C-4 zoning only two days after granting the defendants' zoning petition, actions which allowed the defendants to complete their financing plans for the West Park Mall development. The plaintiffs also contend that there is a genuine issue of material fact as to the viability of their project, which renders summary judgment inappropriate.

The facts that support plaintiffs' position may be summarized as follows: Commencing in 1973, plaintiff Staples attempted to secure tenants for the Westborough Mall, especially anchor (or major) tenants such as J. C. Penney, Sears or Famous-Barr. No major tenants expressed interest, however, and Staples abandoned his plans for approximately two years. Then, in September, 1976, Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the city in June, 1977. That same month, the city council enacted ordinance 1204, which corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4.

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purposes of deciding defendants' motions for summary judgment that Cape Girardeau was a "one shopping mall town." We adopt this assumption as well.

Site work on the Westborough project also began in 1977. Water drainage systems were installed, a survey was conducted and grading and other surface improvements were made. By December, 1978, the plaintiffs had expended more than $1 million on the development. No anchor tenants had yet committed themselves to the project, but letters of interest from many smaller stores had been received. Steps were being taken to secure additional financing to begin construction of the mall shell, and because of the reluctance of any major store to become a tenant, the plaintiffs were investigating a new anchor store concept — an "Elite" store composed of a number of small tenants.

Defendant Drury's plans for a shopping mall in Cape Girardeau were also proceeding during this time period. Drury sought to enter into a joint venture with the May defendants, who were experienced shopping mall developers. His discussions with May officials culminated in at least a tentative agreement with them to proceed to develop the West Park Mall in 1977. The agreement was a beneficial one in several respects, one of which was the probability of obtaining a Famous Barr store as an anchor tenant because Famous Barr was a subsidiary of May. An October, 1977, memorandum[2] by Drury to the Drury Industries Board of Directors suggested:

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[2] Many of the facts in support of plaintiffs' claims are contained in documents produced by the defendants in discovery and submitted by the plaintiffs to the district court. The plaintiffs' requests for additional time for discovery to depose the private defendants were denied by the district court. The plaintiffs allege on appeal that the district court erred in this refusal. We find no abuse of discretion. *See Moore v. Sylvania Electric Products, Inc.*, 454 F.2d 81, 83 (8th Cir. 1972).

The defendants challenge any reliance upon the documents submitted by the plaintiffs, alleging that they are an unauthenticated "hodge-podge" of notes that are inadmissible hearsay and should not be considered in evaluating the district court's grant of summary judgment. The district court ruled that it considered "all the evidence submitted," and we believe the documents are sufficiently reliable for us to determine whether the record as a whole supports the district court's decision in this case. *See generally Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1302-1303 (9th Cir. 1978).

> Participation by [May Stores] in the center does not automatically guarantee that a Famous Barr store will be in the center. However, the track record is that [May] is not involved in any center that does not have a first-line May department store in it. A Famous Barr store in Cape Girardeau is a calculated risk. With [May] participation in our center, however, it is very doubtful that Famous Barr, in the event it does not go in our center, will go in any other competitive center in our market area.

Drury's contribution to the joint venture included assistance in dealing with city officials. Indeed, Drury had received a letter from the city attorney as early as 1974, about the same time that plaintiff Staples was informed by the mayor that C-4 zoning was required to build a shopping mall, which indicated that Drury could proceed to develop his center with C-2 or regular commercial zoning.[3] As Drury later disclosed to May officials, his strategy was "low key." In 1977, he informed them that he already had talked with defendant Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all of the West Park Mall property. Drury believed that C-2 zoning would allow plans for the shopping mall to proceed in secret for as long as possible, thus avoiding any challenge by plaintiffs or others who might seek to thwart the development.

The evidence supports plaintiffs' suggestion that Drury and Lawley, the city manager, worked closely together to obtain the zoning change required for the West Park Mall property. After a September, 1978, meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center

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[3] The city attorney's letter suggested that a C-4 classification was preferable, however, and Drury appears to have recognized that C-4 zoning would ultimately be required for a regional shopping facility. The city attorney's letter gave Drury the option of performing initial work with only C-2 zoning.

site in exchange for the Silver Spring Road extension" right-of-way that he owned. Moreover, Drury reassured May officials that because the "center is desired by the powers that be," there was no risk in initially seeking C-2 zoning and worrying about the C-4 zone later. Indeed, a schedule adopted by the defendants for obtaining the necessary zoning was characterized by Drury as "C-2 zoning per Lawley schedule."

Finally Drury himself prepared the city manager's report to the city council concerning the West Park Mall's application for C-2 and then C-4 zoning. Lawley merely edited Drury's draft of this report prior to submitting it to the council on February 6, 1979. Drury's draft explicitly stated his desire to apply for C-2 zoning "with no mention of a subsequent or follow-up C-4 rezoning request."

Drury's zoning "strategy" raised some concerns with anchor tenants he was trying to attract to the West Park Mall, however. Notes of a phone conversation produced by Drury indicate that Drury's ability to obtain the required C-4 zoning was questioned by at least one prospective anchor tenant, J. C. Penney, even though Drury attempted to be very reassuring. "[Z]oning will not be a problem," Drury's notes stated, although because of plaintiffs' C-4 zoning, the J. C. Penney spokesperson could "hardly believe [Cape Girardeau] will zone * * * a second shopping center site."

Penney's concern regarding the West Park Mall zoning was important to the May-Drury defendants, since neither the plaintiffs nor the defendants had yet been successful in attracting anchor tenants. The West Park Mall was in direct competition with plaintiffs' Westborough Mall for these tenants, and the evidence in the record demonstrates that the defendants carefully monitored the plaintiffs' progress. For example, a June 6, 1978, memorandum from a May official states that because "Cape Girardeau cannot support two centers," Famous Barr should decide quickly whether it was interested in participating in the West Park Mall. The memo suggested that because of

reports concerning plaintiffs' competing site, "[o]ur partner, Charles Drury is insisting we attempt to firm up both J. C. Penney and Sears now, followed immediately by Dillards if Famous Barr has not made up its mind by the end of this month."

Drury's concern about plaintiff's progress is also reflected in his noted in September, 1978 — the same month he met with city officials concerning the West Park Mall's rezoning application. These notes somewhat cryptically state, "Staples — trouble — attack zoning." Drury also wrote in February, 1979, "stop them from building so we maybe get a chance to build." The plaintiffs allege that this is exactly what happened in April of 1979.

On April 4, 1979, the city council approved defendant Drury's C-2 zoning application for the West Park Mall, after a hearing at which the plaintiffs and others objected to the change. On April 5, plaintiff Staples filed suit in state court to challenge the city council's action. The next day, Lawley, the city manager, announced to the press that plaintiffs' zoning had reverted from C-4 to residential. The local television news and the Cape Girardeau newspaper carried the story. On April 11, 1979, after conferring with the city attorney, Lawley instructed the city engineer to change the city's master zoning map to show a reversion of the Westborough site from C-4 to its original zoning. The engineer followed these directions.

Lawley presented his opinion that plaintiffs' C-4 zoning had reverted by operation of Chapter 30, § 31, subsection (e) of the Code of Ordinances to the city council on April 13. Lawley said that because the plaintiffs had not built a shopping mall on their property within three years of the original C-4 grant in 1974, this ordinance operated to automatically revert their zoning to the classification in force prior to the establishment of the C-4 district.[4] Lawley stated that the reverter would be applied to

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[4] Lawley was wrong; plaintiffs' zoning was exempt from the application of the reverter ordinance in the Cape Girardeau Code of Or-

plaintiffs' property until he was ordered otherwise by the city council or a court. Although the city council discussed the issue, no action was taken at this meeting.

Thus, on April 20, 1979, a May official was able to report to a J. C. Penney official not only that the defendants' C-2 application had been granted, but also that

> the City Council has reviewed the file of the zoning proceedings on the Westborough site. In doing so, they have concluded that because of the wording of the zoning regulations, requiring essential completion of the project within three (3) years from the date of an enactment of the C-4 ordinance, and since no construction on the site has begun, that the C-4 zoning on the Westborough site has expired and ground has reverted to its previous zoning status of M-1, light industrial, and R-1, residential. In a conversation with the City Manager, he informed me that he is revising the zoning map to reflect this change. He has also directed the engineering department not to issue a building permit for the Westborough project. It is probable that this action will be challenged and will ultimately be resolved in court. However, this would effectively preclude any developement by the Westborough group until this issue is resolved.

On May 23, 1979, plaintiffs' financier, Green, wrote to the city manager requesting clarification of the status of the Westborough Mall's zoning. Lawley replied that, in his opinion, the C-4 zoning had reverted, and he enclosed a copy of the zoning ordinances and the official zoning map, which reflected the reversion, with his response. Green accordingly notified the plaintiffs that he was suspending his attempts to obtain perma-

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dinances. The defendants argue that because the plaintiffs knew Lawley was wrong and failed to bring the error to his attention, they somehow waived their right to challenge his actions. This argument is clearly without merit.

nent financing for plaintiffs' project until the zoning issue was resolved.

The West Park Mall developers then obtained a second rezoning of their property from C-2 to C-4 on August 1, 1979. Over the next year, the plaintiffs were unable to progress in the development of Westborough Mall. Work on the West Park Mall project continued and the mall ultimately was opened in 1981. It was not until September 17, 1980, almost a year and a half after the master zoning map was changed, that the city council adopted ordinance 1599, which "reaffirmed" that the Westborough Mall site was zoned C-4. As the plaintiffs had believed throughout, this ordinance confirmed that because the plaintiffs' C-4 grant was specifically exempted from the application of Chapter 30, § 31, subsection (e), no automoatic reverter could be applied to the Westborough Mall site.

In view of these facts and the inferences that reasonable persons might draw from them, the plaintiffs contend on appeal that the district court erred in granting summary judgment on all seven counts of their complaint. We will consider each of the plaintiffs' allegations in turn.

I.

In Count 1 of their complaint, the plaintiffs allege that the City of Cape Girardeau, the city manager and five city council members violated 42 U.S.C. § 1983. The plaintiffs challenge the district court's grant of summary judgment as to this count on the grounds that the court erroneously held that the city is immune from suit under section 1983, the city took no official action with respect to plaintiffs' zoning for the mall, and the acts of the defendants had no detrimental effect on plaintiffs' development.

In *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980), we held that local officials who acted in a legislative capacity were immune from suit under section 1983. *Id.* at 613-

614. Our ruling was based in part upon the recognition that municipalities may be held liable for unconstitutional conduct. *Id.* at 613. *See Owen v. City of Independence,* 445 U.S. 622, 657 (1980). The plaintiffs do not contend that the district court misapplied *Gorman* with respect to the individual city officials. Rather, they interpret the court's ruling as granting the city itself immunity, and argue that this holding must be reversed.

The city acknowledges that it may be liable under section 1983 if official action was taken to deprive the plaintiffs of their constitutional rights, and we believe that the district court's opinion does not hold to the contrary. In our view, the district court based its grant of summary judgment in favor of the city primarily on its view that no official action was taken by the city with respect to the alleged reversion of plaintiffs' C-4 zoning. On appeal, the city has argued that no official action was taken because the city manager's actions concerning the C-4 reversion were merely expressions of his own opinion and did not result in any change in the status of plaintiffs' zoning. In context of a motion for summary judgment, this contention cannot be accepted.

As chief executive officer of the city, the city manager is responsible for enforcing the city's zoning ordinances. *See* Mo. Rev. Stat. § 78.610(2). After conferring with the city attorney, city manager Lawley acted pursuant to this authority and directed that the official zoning map be changed to reflect a reversion of the zoning on plaintiffs' Westborough Mall site from C-4 to its prior classification. Lawley also instructed that no building permit should be issued for the mall. The city engineer followed these directions.

Moreover, although the city manager is "subject to the direction and supervision of the council," *id.*, Lawley communicated his opinion that Chapter 30, § 31, subsection (e) applied to revert plaintiffs' C-4 zoning to the city council, and told them of his instructions to the city engineer. The council enacted no or-

dinance explicitly ratifying Lawley's conduct, but an ordinance would not necessarily be required if the council agreed with Lawley's position. The city's argument that a city manager's action becomes official policy only upon the enactment of a resolution by the council is thus unpersuasive in this situation, since by knowing inaction, the city may have ratified Lawley's action here.

The official zoning map of the city was changed to eliminate plaintiffs' C-4 zoning. Lawley, the mayor and the city engineer publicly stated that the plaintiffs had lost their C-4 zoning, and Lawley reiterated this position in his letter to plaintiffs' financier. This erroneous reversion was corrected when the city enacted ordinance 1599 "reaffirming" plaintiffs' right to C-4 zoning, but from April, 1979, to September, 1980, the plaintiffs were effectively deprived of their C-4 classification.

We therefore find that the district court erred in its summary judgment that the city took no official action with regard to Westborough Mall zoning. The actions by city officials in this case were not merely isolated incidents, *see Landrigan v. City of Warwick,* 628 F.2d 736, 746-747 (1st Cir. 1980), but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning. *See Black v. Stephens,* 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied,* 102 S.Ct. 1646 (1982); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980). We find the plaintiffs have presented sufficient evidence that the reversion of their zoning "was caused by the official conduct of * * * those whose acts may fairly be said to represent official policy," *Owen v. City of Independence,* 589 F.2d 335, 337 (8th Cir. 1978), to preclude a grant of summary judgment on this ground.

The district court also appeared to base its grant of summary judgment on its findings that the city manager's actions "had no detrimental effect on Westborough Mall's development in light of the Mall's prior history and potential by April, 1979," and that there was "no evidence of a link between the acts of

either [the city defendants or the West Mall developers] to damages suffered by plaintiffs." As the district court correctly noted, the plaintiffs owed money to the Penzel Construction Company and to the Bank of New Madrid, had been unsuccessful in securing anchor tenants and had not yet filed an application for the financing necessary to develop the Westborough Mall when the city announced in April, 1979, that the plaintiffs' C-4 zoning had reverted to residential and manufacturing classifications.

We agree with the plaintiffs, however, that the district court failed to view the evidence in a light most favorable to them when it concluded as a matter of law that the plaintiffs' interests were in no way damaged by defendants' actions. The district court, in essence, held that the evidence compelled the conclusion that the Westborough Mall failed because of plaintiffs' poor business skills. In making this judgment, the court made "a choice of inferences to be drawn from the subsidiary facts" presented by both parties, *United States v. Diebold,* 369 U.S. 654, 655 (1962), a choice which is impermissible on a motion for summary judgment.

Our review of the record leads us to conclude that there is a genuine issue of material fact as to the viability of plaintiffs' development. Staples' testimony,[5] Green's testimony and documents produced by the defendants could reasonably support the conclusion that the Westborough Mall failed to attract major tenants and to obtain further financing because the land

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[5] The defendants characterize Staples' testimony as "self-serving and conclusory opinions and conjecture," which they argue cannot serve as a basis for denying summary judgment. Unlike the situations presented in the cases cited by the defendants, *see, e.g., Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 556-557 (5th Cir. 1980), *cert. denied,* 454 U.S. 927 (1981); *Thornhill Publishing Co. v. General Telephone & Electronics Corp.,* 594 F.2d 730, 738 (9th Cir. 1979), there are specific facts which support the plaintiffs' view of the effect of the reverter, however.

lost its C-4 designation at the same time that a competitor—defendants' West Park Mall development—was granted the required zoning to develop a regional shopping facility. The plaintiffs had invested over $1 million in the Westborough Mall project; site preparations had been made and letters of interest had been received. The defendants viewed plaintiffs' progress as a potential threat to their plans. Moreover, there is evidence that temporary financing could perhaps have been obtained to construct the Westborough Mall shell, even without an anchor tenant committed to the project, had plaintiffs been given the opportunity to develop the "Elite" store concept. The palintiffs' financier halted his efforts to obtain such financing after the zoning controversy developed.

Before the reverter in April of 1979, the plaintiffs had a valuable leasehold interest in the only land in Cape Girardeau that was zoned for an integrated shopping center and on which site improvements had already been made. Assuming Cape Girardeau is a "one shopping mall town," this interest should have been marketable, yet the evidence suggests that the plaintiffs may have been unable to sell their leasehold after the announcement of the reversion, as a result of the "cloud" that had been placed over the status of the zoning of their property. The plaintiffs have thus presented facts that they were damaged by the application of the reverter to their property through September, 1980, when the council enacted ordinance 1599 reaffirming their entitlement to the C-4 classification. We therefore find that the district court erred in concluding as a matter of law that the plaintiffs were not damaged in any way by the reverter, and accordingly we hold the court erred in granting summary judgment on Count 1 of plaintiffs' complaint.

II.

Counts 2 through 4 of plaintiffs' complaint contain various allegations of a conspiracy between the city defendants and the West Park Mall developers regarding the reverter of plaintiffs'

C-4 zoning and the grant of C-2 and then C-4 zoning to the private defendants: Count 2 alleges a conspiracy between the city and the West Park Mall developers to deprive the plaintiffs of their constitutional rights; Count 3 alleges a conspiracy among all the defendants to restrain trade in violation of section 1 of the Sherman Act; and Count 4 alleges a conspiracy to monopolize the shopping center market in violation of section 2 of the Sherman Act. In granting summary judgment on these claims, the district court stated that the "plaintiffs have been unable to unearth a shred of evidence linking an improper act of the City defendants to the private developers' efforts to build West Park Mall."

The plaintiffs concede that "the evidence of conspiracy is not direct and overwhelming," and we agree with this statement. Nonetheless, the elements of a conspiracy are rarely established through means other than circumstantial evidence, *see, e.g., Crowe v. Lucas,* 595 F.2d 985, 993 (5th Cir. 1979), *cert. denied,* 102 S.Ct. 1251 (1982), and summary judgment is only warranted when "the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided." *Admiral Theatre Corp. v. Douglas Theatre Corp.,* 585 F.2d 877, 883 (8th Cir. 1978) (citations omitted). The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy. *Id.* at 884. *See Poller v. Columbia Broadcasting System,* 368 U.S. 464, 472-473 (1962).

Our review of the record in view of these standards convinces us that the district court erred in its conclusion that there was *no* evidence of a conspiracy between the city officials and the May-Drury defendants.

In order to establish a cause of action based upon a conspiracy in this case, the plaintiffs had to show with at least circumstantial evidence that the private developers made a deal with the city or with at least some of the city officials whereby

the city would act to stop plaintiffs' Westborough Mall by casting doubt upon the status of their zoning long enough to allow the defendants' West Park Mall to secure tenants and to obtain a sufficient "head start" on construction. The circumstantial evidence of such an illegal agreement consists of the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to "stop them from building so maybe we get a chance to build," and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction.

Defendant Drury has filed an affidavit stating that no Drury defendants "knew in advance about, participated in, or conbuted to Mr. Lawley's opinion" regarding the C-4 reversion, and Lawley has denied the existence of any agreement to assist the West Park Mall developers by taking plaintiffs' zoning from them, but we find there is sufficient evidence of a possible conspiracy to illegally revert plaintiffs' zoning to withstand a motion for summary judgment.

The preferential treatment accorded Drury by city officials is illustrated by the facts concerning the West Park Mall zoning. Drury was confident that zoning would not present a problem for his development plans at a very early date, even though the plaintiffs had obtained a C-4 classification and the defendants believed that Cape Girardeau could only support one shopping mall facility. Drury was allowed to proceed under a C-2 classification, while the plaintiffs were advised that a C-4 zone was required. Drury's feeling that the West Park Mall was "desired by the powers that be" suggests that he had struck an agreement with the city officials that would ensure his mall's success. Although proof of private meetings with city officials may not be sufficient evidence of any improper arrangements, Drury's involvement with city officials went beyond such meetings: Drury obtained a "tacit" agreement for C-4 zoning

prior to any city council action concerning either the C-2 or C-4 zoning changes that he requested, he wrote most of the city manager's report to the city council concerning his rezoning request, and he referred to his zoning application plans as "C-2 per Lawley schedule."

We wish to emphasize that this preferential treatment alone would not be grounds for a cause of action by the plaintiffs: the relationship between the city and Drury is, however, evidence from which a trier of fact could infer the existence of a conspiracy to deprive the plaintiffs' of their zoning rights.

Other circumstantial evidence of an illegal agreement to revert the plaintiffs' C-4 zoning includes the defendants' desire to stop plaintiffs' development, or at least slow it down, so that West Park Mall could be brought to a stage where it could effectively overcome competition by the plaintiffs. Prior to the reverter announcement, the record shows that the May-Drury defendants considered the Westborough Mall to be a "competing site"—indeed, they concede there is no inherent advantage to their location over that of the plaintiffs. They acted to secure anchor tenants as quickly as possible when it appeared that the plaintiffs might be in a position to sign such tenants. The plaintiffs had begun site preparations and had obtained both the required zoning and a building permit from the city when Drury's notes in February, 1979, state "stop them from building so we maybe get a chance to build."

The May-Drury defendants do not deny that the reversion of plaintiffs' zoning was of great benefit to them. Only days after the reverter was announced, they told J. C. Penney officials, who had doubted Drury's ability to obtain council approval for another C-4 district in the City of Cape Girardeau, that the reverter would effectively preclude any development of the Westborough Mall until the status of plaintiffs' zoning was resolved in court.

Finally, the timing of the reverter supports an inference of a conspiracy to delay plaintiffs' project by reverting their C-4

zoning. Ordinance 904, enacted in 1974, granted the plaintiffs a C-4 classification and specifically stated that the grant was exempt from the requirement of the city's reverter ordinance. Yet, in 1979, two days after the defendants obtained C-2 zoning on all of their property, and two years after the automatic reverter would have gone into effect, the city manager reviewed the Westborough file, missed the explicit reference to the exemption, forgot about its existence even though he was the city manager at the time the ordinance was enacted, and announced that, in his opinion, the plaintiffs' C-4 zoning had reverted to its prior classification.

It is true that no city official appears to have a direct financial interest in the West Park Mall, but Drury's association with the May defendants may have allowed him to offer the city a Famous Barr store if the West Park Mall were allowed to develop according to Drury's plans, which the plaintiffs in effect could not.[6] Or, perhaps the city was interested in Drury's right-of-way, which he may have offered the city in exchange for the "tacit" agreement for a C-4 district in September, 1978.

Under all of these circumstances, giving the plaintiffs the benefit of the reasonable inferences that may be derived therefrom, we believe the district court erred in concluding as a matter of law that no conspiracy existed. The inference that defendant city officials and the West Park Mall developers conspired to deprive the plaintiffs of their legal right to C-4 zoning and to block their development plans is not an irrational one.

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[6] Famous Barr is a subsidiary of the May Company. In a February 14, 1979, phone conversation with a May official regarding Drury's strategy to obtain the required zoning changes for the West Park Mall, Drury stated, "[w]e'll have to talk to these people quietly—we can't bring this out in the open meeting, but * * * if we have to, we'll produce the letter from Famous saying * * * this is the only site in Cape Girardeau that they will * * * [locate in]." While this conduct alone is not illegal, it is evidence from which a trier of fact could infer an illegal agreement with the city to revert plaintiffs' zoning.

Although the facts in support of such a conspiracy are not conclusive, they also are not "meaningless," as the defendants contend.

In sum, our review of the facts presented thus far convinces us that the defendants were not entitled to a summary judgment in their favor under section 1983 or under sections 1 or 2 of the Sherman Act. Although the record is not fully developed, we believe the district court erred in granting summary judgment on the grounds that there was no official action by the city regarding the status of plantiffs' zoning, that there was no evidence of a conspiracy, and that there was no evidence that the actions of the defendants had a detrimental effect on the viability of the plaintiffs' project or the value of their leasehold interest. The city may be liable to the plaintiffs under section 1983 if the plaintiffs establish at trial that the city acted under color of state law to deprive them of their property rights without due process. *See generally Parratt v. Taylor,* 451 U.S. 527, 535 (1981). The West Park Mall defendants may also be liable under section 1983 if the plaintiffs can prove the existence of a conspiracy with the city to deprive them of these rights.

Moreover, we cannot say at this stage that the plaintiffs' antitrust claims are wholly without merit. The plaintiffs may recover under their section 1 Sherman Act claim if they prove at trial that there was an agreement between the city officials and the West Park Mall developers which was intended to harm or unreasonably restrain trade; that as a direct result plaintiffs have been injured; and that the damages sustained are capable of reasonable ascertainment and are not speculative or conjectural. *Rosebrough Monument Co. v. Memorial Park Cemetary,* 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied,* 107 S.Ct. 2915 (1982); *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 883-884. The defendants may also be liable under section 2 of the Sherman Act for a conspiracy to monopolize the shopping center market if the plaintiffs can establish: (1) the existence of a conspiracy, (2) overt acts in furtherance of the con-

spiracy, (3) a substantial amount of commerce, and (4) a specific intent to monopolize.[7] *See generally* 2 Von Kalinowski, Antitrust Laws and Trade Regulation, § 6.01[1]&[3] (1982); 3 *id.*, § 7.01.

The defendants assert that even if the plaintiffs successfully prove all the elements of a section 1983 or an antitrust violation, the district court's grant of summary judgment should be upheld because all the defendants were protected from liability under the *Noerr-Pennington* and *Parker v. Brown* doctrines. We disagree. The *Noerr-Pennington* doctrine exempts from the antitrust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). *See generally* 7 Von Kalinowski, Antitrust

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[7] Count 6 of plaintiffs' complaint also alleged an illegal monopoly in violation of section 2 of the Sherman Act. Assuming arguendo that the regional shopping center market in Cape Girardeau is the relevant market for antitrust purposes and that Cape Girardeau would only support one shopping center, the defendants argue that the plaintiffs' monopolization claim must fail as a matter of law because the West Park Mall defendants are "natural monopolists" who succeeded through fair competition. These defendants boldly assert that they "succeeded simply because they knew what they were doing and plaintiffs failed because they didn't." We rejected the district court's conclusion to this effect above. When the facts are viewed in a light most favorable to the plaintiffs, there is evidence to support the inference that the defendants achieved their "monopoly" through "exclusionary, unfair, or predatory means." *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 991 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978). *See Supertur:f, Inc. v. Monsanto Co.,* 660 F.2d 1275, 1277, 1279 (8th Cir. 1981). While "a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it," in this case there is an "affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp. v. Newspapers of New England, Inc.,* 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961) (citations omitted). Hence, the district court erred in granting summary judgment against the plaintiffs on their illegal monopolization claim.

Laws and Trade Regulation, *supra,* § 46.04. This exemption is based upon the First Amendment and hence extends to any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers v. Pennington, supra,* 381 U.S. at 670. The plaintiffs argue the *Noerr* exemption does not apply in this case because government officials are alleged participants in the conspiracy. *See Duke & Co. v. Foerster,* 521 F.2d 1277, 1281-1283 (3d Cir. 1975). This coconspirator exception has been criticized, however, *see, e.g., Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 229-230 (7th Cir. 1975), and we decline to base our decision on the presence of the government as a defendant herein.

Rather, we find that the defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150, supra,* 440 F.2d at 1099. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra,* § 46.04[3] at 46-55. In *Gorman Towers, Inc. v. Bogoslavsky, supra,* we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption. *Id.,* 626 F.2d at 615. Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal*

Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 266 (D.C.Cir. 1981), *cert. denied,* 102 S.Ct. 1293 (1982).

We also disagree with the district court's holding that the state action exemption established in *Parker v. Brown,* 317 U.S. 341 (1943), precludes any liability by the defendants as a matter of law. *Parker* immunity is intended to exempt from the antitrust laws state actions that are anticompetitive in nature. "[W]here a restraint upon trade or monopolization is the result of valid governmental action * * * no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* 365 U.S. at 136. The *Parker* doctrine applies to municipal action "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Community Communications Co. v. City of Boulder,* 50 U.S.L.W. 4144, 4147 (1982). Even if zoning in general can be characterized as "state action," *see Sound, Inc. v. American Telephone & Telegraph Co.,* 631 F.2d 1324, 1334 (8th Cir. 1980) (factors relevant to determining "state action"), a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy. *See Stauffer v. Town of Grand Lake,* 1981-1 CCH Trade Cases ¶ 64,029 at 76,330 (D. Colo., October 9, 1980); *Mason City Center Associates v. City of Mason City,* 468 F. Supp. 737, 741-744 (N.D. Ia. 1979). *See also Guthrie v. Genesee County,* 494 F. Supp. 950, 955-958 (W.D.N.Y. 1980).

III.

Finally, we must address plaintiffs' contentions that the district court erred in granting summary judgment against them on their state law claims: Count 5, which alleged a conspiracy to interfere with plaintiffs' valid business relationships and contract rights; and Count 7, which challenged the ordinances granting C-2 and C-4 zoning to the defendants. The district court

dismissed Count 5 by holding that the efforts of the West Park Mall developers were legitimate business activities and that plaintiffs' mall failed because of their poor business skills, not because of any actions by the defendants. Because of our finding that the district court erred in making these conclusions as a matter of law, we also reverse the grant of summary judgment as to Count 5 of plaintiffs' complaint. We believe there are genuine issues of material fact as to whether the defendants illegally conspired to thwart plaintiffs' efforts to develop Westborough Mall and whether the reversion of plaintiffs' C-4 zoning caused the plaintiffs' development to fail. As we have previously stated, we decline to apply the *Noerr-Pennington* doctrine under the circumstances of the present case, and, therefore, reject defendants' argument that it supplies an alternative ground for upholding the district court's grant of summary judgment on this count. *Cf. First National Bank v. Marquette National Bank,* 482 F.Supp. 514, 524-525 (D. Minn. 1979), *aff'd,* 656 F.2d 191 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981) (*Noerr-Pennington* doctrine protects the defendants from liability on tortious interference claim "to the extent that plaintiffs' claims are based upon lobbying and litigation activities [and] there are no genuine issues as to any material facts").

Count 7 of plaintiffs' complaint challenged the reasonableness of the rezoning of the West Park Mall. The district court held that the plaintiffs had no standing to challenge the change in defendants' zoning and in any case found ordinances 1437 and 1369 to be valid. We affirm the district court's grant of summary judgment on this count because we agree that the plaintiffs lack standing under state law to object to the ordinances at issue.

Missouri law currently provides that in order to have standing the plaintiffs must be aggrieved parties — that is, they "must demonstrate a specific and legally cognizable interest in the subject matter of the [challenged] decision and that [they have]

been directly and substantially affected thereby." *Palmer v. St. Louis County,* 591 S.W.2d 39, 41 (Mo. App. 1979) (citations omitted). *See* Mo. Rev. Stat. § 89.110. Competitive disadvantage alone does not give rise to standing, *Schmitt v. City of Hazelwood,* 487 S.W.2d 882, 888 (Mo. App. 1972), and although plaintiffs' leasehold is less than one mile from the West Park Mall, they have failed to demonstrate how the city's rezoning of defendant's property — apart from the reversion of plaintiffs' C-4 zoning — affects a protectable interest of the plaintiffs beyond mere competitive disadvantage. *See Palmer v. St. Louis County, supra,* 591 S.W.2d at 41. The plaintiffs' land is not directly adjacent, contiguous to, or within sight of defendants' land. *See, e.g., Schweig v. City of St. Louis,* 569 S.W.2d 215, 220-221 (Mo. App. 1978) (and cases cited therein).

The harm allegedly suffered by the plaintiffs as a result of the city defendants' actions occurred because of the reversion of *their* C-4 zoning. Although the fact that defendants' property was rezoned is related to the damage to plaintiffs' interests, the rezoning *alone* would not have caused any special injury to them other than affording them competition. Thus, we affirm the district court's grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.[8] Because we agree that the plaintiffs lack standing under current state law, we need not consider the district court's rulings on the substantive issues raised by the plaintiffs.

IV.

In conclusion, we reverse the district court's grant of summary judgment in favor of the city and the private defendants

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[8] It has been suggested that Missouri law on the issue of standing may be undergoing some change. If any such change occurs prior to the entry of final judgment by the district court, the court is free to reconsider its decision that plaintiffs lack standing in view of the new developments in state law.

on Counts 1 through 6 of plaintiffs' complaint.[9] The district court, in holding that the plaintiffs were not entitled to judgment on these claims as a matter of law, weighed the evidence presented without giving the plaintiffs the benefit of the reasonable inferences that could be made from the facts presented; genuine issues of material fact preclude summary disposal of these counts. The district court correctly held that the plaintiffs lack standing to challenge the West Park Mall rezoning under current state law and we, therefore, affirm the grant of summary judgment in favor of all defendants on Count 7 of plaintiffs complaint.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[9] We affirm the district court's grant of summary judgment in favor of the individual city officials. *See Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613-614 (8th Cir. 1980).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1356, 84-1304

Westborough Mall, Inc., a corporation, George Staples, Jr., individually, and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership,
Appellees,

vs.

City of Cape Girardeau, Missouri, a municipal corporation,
Appellant.

Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Drury Industries, Inc., a corporation and May Centers of Cape, Inc., a corporation.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a municipal corporation, Charles L. Drury, Drury Industries, Inc., a corporation, May Department Stores Co., a corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a corporation and May Centers, Inc., a corporation,
Appellees.

Submitted April 11, 1985
Decided June 17, 1986

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, and WOODS,* District Judge.

McMILLIAN, Circuit Judge.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri limited partnership, (appellants) appeal from a final judgment entered in the District Court for the Eastern District of Missouri upon a jury verdict in a 42 U.S.C. § 1983 action in favor of the City of Cape Girardeau, Missouri (the City), members of the city council in their individual capacities, Drury Industries, Inc., May Department Stores Co., West Park Associates, May Centers of Cape, Inc., and May Centers, Inc. (appellees). Appellants alleged a denial of procedural due process, a conspiracy between the City and the private appellees to deprive them of their constitutional rights and antitrust violations. For reversal appellants argue that the district court erred (1) in instructing the jury, (2) in holding that the actions of the city officials did not represent official policy, and (3) in denying appellants' motion for directed verdict and for judgment notwithstanding the verdict on the procedural due process claim against the City. For the reasons discussed below, we reverse and remand for proceedings consistent with this opinion.

This case is before this court on appeal for the second time. In the first appeal a grant of summary judgment in favor of appellees was reversed and the case was remanded for trial. *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982) (*Westborough I*), *cert. denied,* 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983). The following statement of facts is taken in part from the opinion in *Westborough I.*

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* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

In the early 1970's both appellant George Staples, Jr., and appellee Charles Drury, president of Drury Industries, Inc., separately expressed interest in developing a shopping mall in the City of Cape Girardeau, Missouri. In 1973 Staples entered into a long-term lease on approximately 67 acres of land for the purpose of constructing a regional shopping facility referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted Ordinance No. 904 which rezoned the Westborough Mall property to C-4, a zoning classification specifically designated for regional shopping center development. This ordinance also exempted the property from the provisions of another ordinance (Ch. 30, § 31(e)), which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in effect prior to the C-4 zoning. This latter ordinance is referred to as the automatic reverter provision.

Staples unsuccessfully attempted to secure "anchor" tenants for the proposed Westborough Mall shopping center. Regional shopping centers depend on "anchor" tenants which are large department stores; smaller stores generally will only agree to lease space in the shopping center after the "anchor" stores have agreed to lease.

In September 1976 Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the City in June 1977. Also in June 1977 the city by ordinance corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4. Site work began in 1977: a survey was conducted, water drainage systems were installed, and grading and other surface improvements were made. By December 1978 more than one million dollars had been spent on the Westborough Mall site. At this time Westborough Mall Associates had received letters of interest from many smaller stores although no anchor tenants had made a commitment. Steps were taken to

secure additional financing and Westborough Mall Associates was investigating a new anchor store concept — an "elite" store composed of a number of small tenants.

Appellee Drury's plans for a shopping center in Cape Girardeau were also proceeding during this period. Drury was interested in developing a shopping center called the West Park Mall which was to be located on land owned by Drury that was less than one mile from the Westborough site. Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop this center. May Centers, Inc., is an experienced shopping mall developer and Famous Barr Co., a large department store chain, is a subsidiary of the May Co.

Drury's contribution to the venture included dealing with city officials. In 1974 Drury received a letter from the city attorney which indicated that Drury had the option of performing initial work with C-2 zoning. In 1977 Drury informed the May officials that he had already talked with W. G. Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all the West Park Mall property. After a September 1978 meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center site in exchange for the Silver Spring Road extension right of way that he owned." On April 4, 1979, the city council approved Drury's C-2 zoning application.

On April 5, 1979, Staples filed a lawsuit[1] in state court challenging the rezoning of the West Park Mall site. On the

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[1] Appellants' action in state court against the five members of the city council individually sought a declaratory judgment that the C-2 zoning of the West Park Mall was invalid.

In July 1979, following the zoning of the West Park Mall to C-4, appellants filed their first amended complaint. The City of Cape Girardeau and a recently elected council member were added as defendants. Appellants sought an injunction against the existing West Park

next day, the city manager, announced to the media that appellants' C-4 zoning had reverted. The local television news and Cape Girardeau newspapers carried the story. On April 11, 1979, after conferring with the city attorney, the city manager[2] gave written instructions to the city engineer to change the City's master zoning map[3] to show a reversion of the Westborough site from C-4 to the original zoning. The city engineer followed these directions. The engineer was also directed not to issue or renew building permits for mall construction to appellants.

Mall rezonings, a permanent injunction against future rezoning, and $2.5 million for damage to their "reputation and credibility" resulting from the city manager's statements about the zoning of the Westborough Mall.

In March 1979 a second amended complaint was filed in state court. George Staples, Jr., and Westborough Mall Associates were added as plaintiffs and Drury Industries, Inc., May Centers, Inc., May Centers of Cape, Inc., W.G. Lawley and Charles L. Drury were added as defendants. The second amended complaint specifically pleaded the automatic reverter exemption and asked for a determination of the Westborough Mall C-4 status, a declaration that the West Park Mall rezonings were invalid, a prohibition against further West Park development, relief under 42 U.S.C. § 1983, $20 million actual damages, and $5 million punitive damages.

[2] W.G. Lawley, city manager of the City of Cape Girardeau, testified he was the chief executive officer for the City and was responsible for the administration of city government and the enforcement of city ordinances. He also testified that he supervised the City Engineering Department, which was responsible for issuing building permits.

[3] The City's master zoning map was a part of the zoning ordinance and is the official record of the zoning districts as established by City ordinance. The map is maintained during the life of the ordinance.

At a meeting of the city council on April 17, 1979, the city manager submitted a study session report to the council which advised the council that appellants' C-4 zoning had reverted by operation of the automatic reverter provision. The report stated in part: "[U]ntil instructed otherwise by the City Council or Court of proper jurisdiction, the City Manager intends to apply provisions of this section [automatic reverter section] to the Westborough Mall property." The city manager further stated that the automatic reverter provision applied because appellants had not constructed a shopping mall on the Westborough Mall site within three years of the granting of C-4 zoning in 1974. Although the city council discussed the issue, no action was taken at this meeting.

On May 23, 1979, appellants' financier wrote to the city manager concerning the status of the Westborough Mall zoning. The city manager replied that in his opinion the C-4 zoning had reverted and he enclosed copies of the ordinance and the official zoning map which reflected the reversion.

On August 1, 1979, the West Park Mall developers obtained a rezoning of their property from C-2 to C-4. Work continued and the West Park Mall opened in 1981.

In September 1980 the city council adopted Ordinance No. 1599, "reaffirming" that the Westborough Mall site was zoned C-4. This ordinance confirmed that the Westborough Mall's C-4 grant had been specifically exempted from application of the automatic reverter provision.

In 1980 appellees removed appellants' pending state action to federal district court. On September 5, 1980, the district court granted appellants' motion to file another amended complaint. The complaint as amended contained seven counts. Count I alleged a 42 U.S.C. § 1983 procedural due process claim against the City and the members of the city council and the city manager individually; Count II alleged a conspiracy to deprive

appellants of their constitutional rights; count III alleged a claim for antitrust violations.[4]

The district court subsequently entered summary judgment on all counts in favor of all defendants and denied appellants' request for summary judgment. In November of 1982 this court in *Westborough I* reversed the district court and held that appellants had stated sufficient facts to entitle them to a trial on the first six counts. 693 F.2d at 748. However, this court sustained the summary judgment in favor of appellees on Count VII seeking a declaratory judgment that the West Park Mall rezonings were invalid. *Id.* This court also held that appellants had no standing to challenge the West Park Mall rezonings. *Id.* This court further dismissed all counts against the members of the city council and the city manager in their individual capacities. *Id.*

A ten-day trial was held in October 1983 on the six counts. Appellants voluntarily dismissed three counts (Counts IV, V, and VI) and the jury returned a verdict in favor of appellees on the other three counts (Counts I, II, and III). Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied. This appeal followed. Appellees cross appealed from the denial of attorneys' fees. Appellants on appeal have abandoned their antitrust claims and appellees have abandoned their claim for attorneys' fees.

I. ***Jury Instructions***

Appellants initially argue that the district court's instructions to the jury relating to Count I were prejudicially erroneous, confusing and misleading, and failed to properly charge the jury

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[4] Count IV was an antitrust conspiracy claim against all the defendants. Count V was a conspiracy claim for malicious interference with appellants' business. Count VI was a monopoly conspiracy claim. Count VII sought a declaratory judgment that the West Park Mall rezonings were invalid.

on key elements of the case. Appellants also assert that the district court's instructions disregarded the law of the case.

In reviewing the trial court's instructions to the jury, we must consider the charge as a whole. *E.g., Total Petroleum, Inc. v. Davis,* 788 F.2d 476, 484 (8th Cir. 1986). There is no harmful error if the charge in general correctly instructs the jury, even if one portion is technically incorrect. *Houston v. Herring,* 562 F.2d 347, 348 (5th Cir. 1977)(per curiam). However, "erroneous instructions are not cured by correct instructions in other portions of the charge when 'the charge leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberation.' " *Id.* (citations omitted). "The test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' " *Id.* at 359 (citation omitted). With these principles in mind, we consider each of appellants' challenges to the jury instructions.

Instruction No. 13 — Automatic Reverter

Instruction No. 13 on the automatic reverter stated in part: "You are instructed that plaintiffs admit that there has never been any legal reverter of the Westborough Mall tract." This statement was based on appellants' amended complaint, paragraph 14b, which stated: "[T]here, in fact, had been no reverter and...said purported reverter, publicized by defendants, was false and illegal, in that Ordinance 904 specifically excluded plaintiffs' land from the reverter provisions...."

Appellants argue that instruction No. 13 incorporated appellees' basic argument and was tantamount to instructing the jury that the City was not liable. Appellants contend that the district court should have given proposed instruction No. 7,[5]

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[5] Plaintiff's proposed instruction No. 7 read as follows:

> The Defendant, City of Cape Girardeau, should be found liable only if the City itself, by an official policy or custom,

which stated that the City may be liable for the actions of the city manager even though his actions were illegal. Appellees argue that the district court did not err in giving instruction No. 13 because it was extracted from appellants' amended complaint.

We conclude after a careful review of the instructions as a whole that instruction No. 13 is prejudicially erroneous because it is not a complete and accurate statement of appellants' position concerning the automatic reverter. Appellants have con-

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caused a violation of the Plaintiffs' constitutional rights. The City is not responsible merely because of an isolated incident where one of its employees acted. However, the City will be liable for the actions of the City Council or of other highranking officials who had final authority to act and whose actions may fairly be said to represent official policy.

It is not required that a policy be officially adopted by the City's lawmakers to create liability, although a resolution or ordinance is clearly the official policy of the City. If the action of a public official has the force of law, the City itself will be liable for acts of individual officers and employees committed pursuant to that action.

It is not required that there be an ongoing pattern of events to establish liability against the City. If a single event takes place pursuant to a general policy, or itself establishes policy, the City may be liable for that action. Moreover, you are instructed that the Defendant City's continuing failure to remedy or undue delay in stopping known unconstitutional conduct of its public officials is a type of informal policy or custom that gives rise to official policy.

You are specifically instructed that a person's action or conduct depriving Plaintiffs of a Constitutional right may fairly be said to represent official policy. In other words, because such action or conduct may be unlawful does not prevent official policy from being represented.

The City Manager is one City official whose actions represent municipal policy, especially if he joined with other high-ranking municipal officers in invoking municipal authority against the Plaintiffs.

sistently asserted that Ordinance No. 904 excluded the Westborough Mall site zoning from the application of the automatic reverter provision and the City later affirmed this. What appellants therefore complained about is not a reversion as the result of the automatic reverter provision, but rather the actions of the City which allegedly had the same effect as the automatic reverter provision. Instruction No. 13 is a serious distortion of appellants' theory concerning the actions of the City. The misleading information contained in instruction No. 13 is not corrected or clarified at any other place in the district court's instructions. *See, e.g., Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 719 (8th Cir. 1982) (single erroneous instruction does not require reversal if error was cured by another instruction or by consideration of the entire charge).

In addition, we agree with appellants that this instruction is contrary to the law of the case. In *Westborough I*, this court considered appellees' argument that no reverter had occurred because the Westborough Mall site had been excluded from the operation of the automatic reverter. The court concluded that "from April 1979, to September 1980, [appellants] were effectively deprived of their C-4 classification." 693 F.2d at 741.

The court recognized then, as we do now, that the deprivation of a constitutional right does not depend on form. We must look at the substance of the actions taken relative to a constitutionally protected right. The essence of a right may be destroyed although the plaintiff's right is still recognized in an ordinance or in a legal title. As the Eleventh Circuit observed in *Reed v. Village of Shorewood*, 704 F.2d 943 (11th Cir. 1983), "deprived" in the due process sense cannot just mean destroy. "If the state prevents [one] from entering [his or her] house it deprives [him or her] of a property right even if the fee simple remains securely [his or hers]. A property right is not bare title, but the right to exclusive use and enjoyment." *Id.* at 949. So if it is true, as alleged by appellants, that appellees' actions destroyed the value of appellants' C-4 zoning right and forced

appellants ultimately to give up construction of a shopping center, appellants were deprived of their property right in the C-4 zoning, even though the C-4 zoning classification was never actually reverted or revoked.

Instruction No. 21 — Availability of Post-deprivation Remedies

Appellants next argue that instruction No. 21, which addresses post-deprivation remedies, was contrary to the law of the case and the law in this circuit. The district court instructed the jury that the availability of post-deprivation state remedies was a defense to a § 1983 action. The district court further instructed the jury that they must consider whether the various alternatives outlined in the instruction were adequate to correct the reverter.[6]

Appellees argue that the district court correctly instructed the jury that appellants had waived their complaints because they had not pursued available administrative or state judicial remedies to correct the mistake of the city manager. Appellees, relying on *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68

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[6] Instruction No. 21 read as follows:

> In considering whether plaintiffs have been deprived of any federally protected constitutional right, you must consider whether they had adequate "post-deprivation" state law remedies. By this I mean, even if you find that the purported "reverter" took place and was the result of an unlawful conspiracy between the City of Cape Girardeau and the West Park defendants you must further consider whether this resulted in a civil rights claim. In this regard, you should consider the fact that plaintiffs could have petitioned a court of the State of Missouri for preliminary injunction requesting that the alleged reverter be corrected. You should further consider the fact that plaintiffs could have sought to have the purported reverter corrected by the City of Cape Girardeau, by talking to the City Manager or the City Council. You must determine whether these various alternatives provided adequate methods of correcting the "reverter" under state law.

L.Ed.2d 420 (1981), argue that no constitutional deprivation occurred because of the availability of these state remedies.

This court in *Westborough I* considered appellees' argument that appellants by their failure to bring the error to the city manager's attention, waived their right to challenge the actions of the city manager. This court held that the waiver argument was "clearly without merit." 693 F.2d at 740 n. 4. Plaintiffs in § 1983 actions are not required to exhaust other remedies before resorting to suit in federal court. *Patsy v. Board of Regents,* 457 U.S. 496, 516, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (1982).

In addition appellees' and the district court's reliance on *Parratt v. Taylor* to bar appellants' claim is misplaced. The availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable. *Parratt v. Taylor,* 451 U.S. at 543, 101 S.Ct. at 1916; *Littlefield v. City of Afton,* 785 F.2d 596, 599 (8th Cir. 1986). There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a predeprivation hearing.

We conclude that this erroneous instruction requires reversal because it permitted the jury to improperly find that appellants suffered no constitutional violation because of the availability of state post-deprivation remedies. Indisputably, this instruction was critical to appellants' claim and resulted in prejudice to appellants.

Failure to Define "Official Policy"

Appellants next argue that the district court erred in refusing to define "official policy" and in refusing to give appellants' proposed instructions Nos. 7-10. Appellants argue that "official policy" is a legal term which has a specific meaning within the context of § 1983 litigation and is neither universally understood by lay persons nor appreciated in all its legal ramifications.

Appellees argue that the district court did not err in failing to define "official policy" because the term is readily understood by a jury. Appellees further assert that appellants' proposed jury instructions offered no definition of official policy. Rather appellants' instructions list the various actions which appellants contended constituted evidence that the city manager's conduct was official policy. Appellees lastly argue that appellants proposed instructions were properly refused because they misstated the law by requiring the jury to find official policy based on certain actions rather than permitting the jury to so find.

The district court, in instruction No. 6, referred to official policy but did not define "official policy." The court in this instruction identified five elements which the jury had to find in order to return a verdict for appellants. Two of these elements are relevant to this discussion. The district court stated that the jury must believe

> that a public official or employee of the Defendant City acted as follows: the City Manager directed that the official zoning map of the City be changed to reflect a reversion or change of [appellants'] zoning from a zoning district which allowed construction of shopping centers (District C-4) and "such action or conduct may fairly be said to represent *official policy*" of the ... City of Cape Girardeau.

(emphasis added).

The parties have not directed us to cases which have considered whether official policy must be defined nor have we found any cases which have discussed this particular issue. However, where terms are not readily understood by the jury or where the possibility of confusion concerning a term exists, the court should define or explain such a term. *See Federal Enterprises, Inc. v. Evans,* 786 F.2d 817, 820 (8th Cir. 1986) (instruction deficient because "key terms, requiring independent factual finding," were not defined); *Board of Water Works*

Trustees v. Alvord, Burdick & Howson & Dorr-Oliver, Inc., 706 F.2d 820, 824 (8th Cir. 1983). We do not agree with appellees that official policy in § 1983 cases is readily understood by a jury without instructions from the court.

"Official policy" had been defined or discussed in many cases prior to the trial of this case. *E.g., Williams v. City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982); *Turpin v. Mailet,* 619 F.2d 196, 201-202 (2d Cir. 1980). The court in *Westborough I* also offered guidance to the parties and to the district court on what constituted official policy.[7]

The Supreme Court, in a case decided after our decision in *Westborough I,* has once again defined public policy, which may be the basis of municipal liability. *Pembaur v. City of Cincinnati,* ____ U.S. ____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (*Pembaur*). The Court in *Pembaur* considered whether a single action by an official can result in county or municipal liability. The Court held that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." At ____, 106 S.Ct. at 1300. The Court further stated that municipal liability may be imposed for a single decision by a municipal policy maker if the

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[7] We note that the instruction offered by appellants is based substantially on this court's decision in *Westborough I.* This instruction, although not designated as a definition of official policy, is a substantially accurate definition of official policy. The district court, however, could have properly found the last two paragraphs of the instruction to be inaccurate in part. In the present case, where an instruction on official policy is essential to the jury's understanding of the case, the district court may not omit the instruction if the tendered instruction is not entirely correct. The court has the "duty to give the substance of the requested instruction where it appears that the instruction on the issue is [necessary] to enable the jury to determine intelligently the question." *Brandes v. Burbank,* 613 F.2d 658, 668 (7th Cir. 1980).

single act (1) is a decision of the legislative body, or (2) is executed in compliance with formal rules or understandings that are intended to, and do, establish fixed plans of action to be followed under similar circumstances, consistently and over time, or (3) is directed by those who establish governmental policy. *Id.* at ____ - ____, 106 S.Ct. at 1298. The Court recognized that municipalities often spread policy-making authority among various officers and official bodies, and, consequently, different officials may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. *Id.* at ____, 106 S.Ct. at 1300.

On remand, the district court should incorporate a definition of "official policy" in its jury instructions.

Instruction No. 30

Next, appellants argue that instruction No. 30 was erroneous because it required the jury to find that appellants had been injured in their business or property before the jury could return a verdict in favor of appellants on the § 1983 procedural due process claim. Appellants argue that injury to business or property is not a prerequisite to liability under § 1983 and that the instruction misled the jury into believing that the deprivation of constitutional rights is not in itself injury without more.

Appellees argue that this issue was not preserved for review because appellants failed to object to instruction No. 30. Further, appellees argue that appellants waived any error by putting the same requirement of damage in their own verdict instruction.

We find no support in the record for appellees' contentions. Although appellants did not object specifically to instruction No. 30 by number, the first objection made by appellants to the proposed charge was that "the proposed charge. . . will mislead the jury into believing that a deprivation of constitutional rights

is not in itself damage, and requires the jury to believe that there needs to be an extra showing of damage over and above that initial deprivation." Moreover, appellants did not, as appellees state, use language in their proposed instructions which corresponds at all to the instructions given by the district court. The only similarity is that both instructions require the jury to find that the actions of appellees have caused damage to appellants.

We hold that instruction No. 30 is prejudicially erroneous because it improperly permitted the jury to find against appellants if the jury found that appellants did not sustain damage to businesses or property. A plaintiff whose constitutional rights have been violated is entitled to a finding of liability and nominal damages even if no compensatory damages are shown. *Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978).

Instructions as a Whole

Appellants next argue that the instructions taken as a whole were prejudicially erroneous. First, appellants argue that the district court submitted multiple claims to the jury but did not adequately distinguish between the claims and the particular instructions related to each claim. We do not decide this issue because appellants made no objection at trial and cannot now raise this issue on appeal. Fed.R.Civ.P. 51; *Smith v. Honeywell,* 735 F.2d 1067, 1075 (8th Cir. 1984).

Appellants' next complaint is that instruction No. 1 unduly emphasized appellants' burden of proof. Appellants object to the length of the instruction but do not otherwise indicate in what way the instruction was erroneous. This argument is without merit. Instruction No. 1 consists of four short paragraphs and is an accurate statement of appellants' burden of proof.

Appellants also challenge the district court's reference in the instructions to "purported reverter." We find no error in this

usage because appellants also used the term "purported reverter" to indicate that the actions taken by the City had the effect of a reverter although the automatic reverter provision did not apply to them.

Appellants next complain that the district court in instruction No. 14 erred in referring to "defendants' zoning rights" when the reference should have been to "plaintiffs' zoning rights." The sentence as it was read to the jury stated: "Was there a conspiracy between the City of Cape Girardeau and the West Park defendants to cause a reverter of *defendants'* C-4 zoning rights?" (emphasis added) Instruction No. 14 as written correctly refers to "plaintiffs' zoning rights," but the district court inadvertently misread the instruction to the jury. Because there was no issue in this case concerning "defendants' zoning rights," we do not believe the jury was misled by the misreading of the instruction.

Appellants next complain that the district court improperly omitted a portion of their proposed instruction No. 6. The proposed instruction would have required the jury to find that the City had engaged in three actions whereas the instruction given by the court required the jury to find only one action by the City in order to return a verdict for appellants. Consequently, the deletion was not prejudicial to appellants because the district court eliminated additional requirements for a verdict in appellants' favor.

II. ***Directed Verdict and JNOV***

Lastly, appellants argue that the district court erred in denying their motion for directed verdict and for judgment notwithstanding the verdict against the City under Count I. Appellants argue that the uncontradicted evidence showed that the City deprived appellants of their C-4 zoning rights without notice or hearing. Appellants urge this court to remand their § 1983 claims against the City for trial on the issue of damages alone.

Appellees argue that one of appellants' points of error on appeal in *Westborough I* was the denial of their motion for partial summary judgment. *Westborough I* did not explicitly consider this point. We agree with appellees, however, that appellants' motion for partial summary judgment was implicitly denied by the panel in *Westborough I.*

The standard for directed verdict and JNOV is the same. A verdict should be directed only when the evidence is such that "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." *Savage v. Christian Hospital Northwest,* 543 F.2d 44, 46 (8th Cir. 1976) (citations omitted). "A directed verdict is in order only where the evidence points all *one way* and is susceptible of *no* reasonable inferences sustaining the position of the non-moving party.' " *Id.* (citations omitted). " 'In making this determination, the evidence together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party.' " *Id.* (citations omitted).

We hold that the district court did not err in denying the motion for directed verdict or JNOV. Reasonable persons could arrive at different conclusions in this case.

Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1304

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a municipal corporation, Charles L. Drury, Drury Industries, Inc., a corporation, May Department Stores Co., a corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a corporation and May Centers, Inc., a corporation,
Appellees.

No. 84-1356

Westborough Mall, Inc., a corporation, George Staples, Jr., individually and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership,
Appellees,

vs.

City of Cape Girardeau, Missouri, a municipal corporation,
Appellant.

Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W.G. Lawley, Drury Industries, Inc., a corporation and May Centers of Cape, Inc., a corporation.

Appeals from the United States District Court
for the Eastern District of Missouri

Filed: October 23, 1986

ORDER

Defendants-appellees' petition for a rehearing en banc is denied. Judges Ross, Gibson, Fagg, and Bowman would grant the rehearing.

Defendants-appellees' petition for rehearing is also denied. In support of their petition for rehearing, the private defendants-appellees contend that the jury verdict in their favor on the Count II conspiracy claim should not be disturbed because the panel found error only in the jury instructions pertaining to the Count I due process claim brought against the City of Cape Girardeau (City). Appellants, on the other hand, contend that the remand is appropriate because a misdirection by the district court on the due process claim prevented the jury from properly considering the conspiracy claim. We agree.

Appellants alleged in Count I of their complaint that the City violated their procedural due process rights and alleged in Count II that the City and the private defendants-appellees conspired to deprive them of these rights. Critical to both claims was the reversion of appellants' C-4 zoning. The district court's automatic reverter instruction in effect told the jury that there was no reverter of the zoning and, therefore, no deprivation of appellants' constitutional rights. It, therefore, follows that the jury could reason that there was no conspiracy because there was no reverter. Thus, the automatic reverter instruction also effectively took the conspiracy claim away from the jury. For this reason, a remand of the conspiracy claim against the private defendants is required.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals for the Eighth Circuit

FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1166

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS, INC., MAY CENTERS OF CAPE, INC., DRURY INDUSTRIES, INC. and CHARLES L. DRURY,
Petitioners,

vs.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Westborough Mall, Inc., George Staples, Jr., and Westborough Mall Associates,[1] plaintiffs-appellants in the action below, respectfully urge that the petition for writ of certiorari sought by petitioners be denied. The decision below clearly does not warrant review by this Court in that it does not conflict with the decision of another federal court of appeals and was correctly decided as to all issues. The questions presented by petitioners involve issues of evidence and factual findings which are not only unique to this case, but which remain to be resolved, upon remand, by a jury.

1. None of the respondents has any parent or subsidiary corporation (other than wholly-owned subsidiaries) or affiliated corporations which have public shareholders within the meaning of Rule 28.01 of this Court.

In *Westborough Mall v. City of Cape Girardeau,* 794 F.2d 330 (8th Cir. 1986) (*"Westborough II"*), the Appellate Court concluded that erroneous jury instructions pertaining to the respondents' due process claim in effect took respondents' Count II conspiracy claim away from the jury, thus requiring a new trial as to all claims and defendants. Count II was totally dependent on Count I because it alleged the same allegations of constitutional deprivations as were alleged in Count I.

In their petition for writ of certiorari, petitioners do not challenge the correctness of the Eighth Circuit's determination regarding the misleading nature of the jury instructions, nor do they fault the conclusion that the misdirection caused by the instructions prevented the jury from properly considering the Count II conspiracy claim. Similarly, petitioners do not claim that the Eighth Circuit's decision in *Westborough II* conflicts with any decision of this Court or any other federal court as to the effect of or remedy for instructional errors. Instead, petitioners ask this Court to determine the sufficiency of the evidence by sifting through the many transcripts and exhibits of a ten-day trial.

To justify review, the petition—liberally salted with rhetoric—claims that *Westborough I* and *II* represent such pronounced departures from well-accepted principles of decision-making that they call for this Court's attention and correction. But nowhere do petitioners state *how* or in *what* manner the Eighth Circuit has so departed from the accepted and usual course of judicial proceedings as to require the Supreme Court's supervision. Obviously, the Eighth Circuit's decision in *Westborough I* has no bearing upon the present petition, and is simply irrelevant in light of this Court's prior denial of certiorari. *Westborough Mall*

v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983). Moreover, in all respects, questions raised by petitioners relating to fact, and inferences to be drawn from the evidence, are not proper bases for certiorari. These questions should be submitted to a jury upon proper instructions, not to the Supreme Court.

In all respects, it is clear that this Court's intervention is not needed, and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Petitioners' statement of the case presents a conspicuously biased and inaccurate description of the present posture of this case. Moreover, petitioners' characterizations of the evidence presented at trial and the inferences from such evidence are simply irrelevant and unnecessary for a determination of their present petition.

These characterizations are irrelevant because petitioners' challenge is actually directed only to the judicial discretion of an appellate court regarding disposition of an appeal once error is found, not to the evidence itself.

In *Westborough II,* the Eighth Circuit found that remand as to the entire case was appropriate because a misdirection by the district court on the due process claim prevented the jury from properly considering *any evidence* on the conspiracy claim. The interdependency of the conspiracy and due process claims required reversal.

In any event, the Eighth Circuit's summary of the facts and procedure is more concise and accurate than petitioners' statement. (*See,* Appendix A at A-42 to A-46). Respondents likewise adopt and incorporate the statement

of the case contained in Respondents' Brief in Opposition to the City of Cape Girardeau's Petition for Writ of Certiorari at pages 3-5).

REASONS FOR DENIAL OF WRIT

From the outset of petitioners' argument, it is obvious that review is sought to have this Court consider the evidence adduced in a ten-day trial. A writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Given the present posture of this case, a review of what the evidence may or may not show is premature. The Eighth Circuit in *Westborough I* (not *Westborough II*) concluded that respondents' evidence could support claims for violation of procedural due process and conspiracy. It then became appropriate for a jury, *after proper instructions*, to weigh the evidence and reach a verdict. The petitioners are still complaining about the court's decision in *Westborough I*, not the Eighth Circuit's holdings about jury instructions in *Westborough II*.

Petitioners' failure or inability to suggest how the Eighth Circuit's opinion in *Westborough II* is erroneous or reversible indicates that a writ of certiorari is not appropriate. The Eighth Circuit's decision announced no new legal principles nor did it depart from well-settled standards of review. Rather, the Eighth Circuit determined that a number of jury instructions given by the district court were prejudicially erroneous and misleading, requiring a new trial. Notably absent from the present peti-

tion for writ of certiorari is any assertion of error regarding the Eighth Circuit's findings as to the jury instructions. Petitioners do not contend that *Westborough II* is in conflict with any decision of this Court or any other federal court. Petitioners merely claim that the Court of Appeals "inexcusably refused to discuss the submissibility of the case against petitioners." (Petition at 8). Obviously, since submissibility requires a complete examination of the evidence, petitioners are asking this Court for a complete review of all evidence adduced during trial as well as a judicial determination of the proper inferences to be drawn from the evidence. But this Court does not sit to review evidence and inferences. Thus, there is simply no justification for a review by the Supreme Court here.

Respondents alleged in Count I of their complaint that the City violated their procedural due process rights. In Count II, the respondents again alleged violation of those same procedural due process rights, adding only that the City and the private defendants-petitioners conspired to deprive respondents of those rights. For that reason, Count II was totally dependent on Count I. The jury could not have found liability on Count II, given its verdict on Count I; and, the private defendants-petitioners could be found liable if, and only if, the City was found liable. Simply stated, the erroneous instructions effectively took the conspiracy claim away from the jury.

Accordingly, the Eighth Circuit's discretion to make determinations concerning disposition of the appeal, once error was found in the instructions, was not abused. Indeed, petitioners focus their current attack, not upon the holdings of *Westborough II* in this regard, but upon their continuing belief that *Westborough I* was "an obviously flawed appellate opinion." Review of *Westborough II* is sought merely out of petitioners' belief that

the Eighth Circuit failed to see the error of their ways in *Westborough I.*

In other words, very little has been stated by the petitioners except *their* opinion that a second trial is unnecessary. To the contrary, the Eighth Circuit believed that the jury was not given proper guidance on complex issues involving the petitioners' deprivation, under color of law, of the respondents' constitutional rights. We respectfully submit that it is the jury that should now turn to the evidence, not the Supreme Court of the United States.

CONCLUSION

Petitioners have pointed out no error by the Court of Appeals and have raised no issue warranting review. This case will be decided by a jury's determination of the facts. It will turn upon its own facts and will affect few, if any, other litigants. Therefore, the petition for writ of certiorari should be denied.

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